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IN THE

Supreme Court of the United States

TERM, 19

No. 404

EVELIO DEL TORO,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Evelio Del Toro prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on May 18, 1970.

OPINION

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported as yet and will be found on pages 1 to 8 of the Appendix.

JURISDICTION

The opinion and the judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered on May 18, 1970, and the order denying a rehearing was entered on June 18, 1970. Copies of the judgment and order denying rehearing will be found on pages 9 and 10 of the Appendix.

The jurisdiction of this Court to enter the writ of certiorari is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT AND ADVISE THE JURY THAT EACH COUNT OF THE INDICTMENT CALLED FOR A MANDATORY JAIL TERM OF 5 YEARS UPON CONVICTION.

STATUTE INVOLVED

The only statutes involved are 26 U.S.C.A. §4724(c) and §7237(b).

STATEMENT OF THE CASE

The decision of the United States Court of Appeals for the Fifth Circuit for which review is sought by this petition, decided an important question of federal law which has not been but should be settled by this Court.

The petitioner was charged and convicted in the United States District Court in Tampa, Florida under a two count indictment charging him with offenses proscribed by 26 U.S.C.A. §4705(a) (count one) and 26 U.S.C.A. §4724(c) (count two). Conviction under count one carried a mandatory minimum five-year sentence without probation.

At the conclusion of the petitioner's trial in the District Court, the petitioner requested the court to instruct and advise the jury that conviction for the offenses charged in both counts of the indictment carried mandatory jail terms. The District Court denied the request and the United States Court of Appeals for the Fifth Circuit affirmed the trial court's ruling.

ARGUMENT

The failure to give the requested instruction left the jury with the erroneous impression and belief that the Court had the discretion and function to impose a sentence justified by the evidence and other circumstances surrounding the charge, evidence and trial. Indeed, juries are expressly charged that it is the function of the Court and Judge to impose the appropriate sentence, which necessarily leads them to believe that the Court and Judge do have a discretion. That, of course, is not true where there is a mandatory minimum sentence applicable, and the jury should be so advised.

A juror is charged with the duty to exercise his function in the "reasonable man" state of mind. He is further required as a "reasonable man" to find guilt only where there is proof "beyond a reasonable doubt". How can a jury subjectively and objectively use a yardstick of "reasonableness" when they are in the dark as to a material portion of the applicable law.

CONCLUSION

The issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit will enable this Court to require an appropriate jury instruction where mandatory minimum sentences are applicable upon conviction, and clear up the misconception given all juries under current practice.

Respectfully submitted,

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